SGS (MALAYSIA) SDN BHD

v.

YB MENTERI SUMBER MANUSIA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[ORIGINATING MOTION: R1-25-87-99]
22 DECEMBER 2000

ADMINISTRATIVE LAW: *Remedies - Certiorari - Dismissal of workman - Jurisdiction of Minister - Reference to Industrial Court - Minister referring dispute to Industrial Court despite allegation that dispute amicably settled - Whether committed an error of law - Whether acted beyond jurisdiction - Whether there was no actual settlement - Industrial Relations Act 1967 ss. 20(1), 20(2), 24(3)*

LABOUR LAW: *Employment - Dismissal - Representation to Director General of Industrial Relations - Power and duties of the Director General - Whether to act as conciliator - Whether to inform Minister only when there was no settlement - Decision to refer dispute to Minister - Whether proper - Industrial Relations Act 1967 ss. 20(1), 20(2)*

The second respondent herein ('Ho') was employed by the applicant company as an Operations Executive at its Prai office. Ho alleged that he had been constructively dismissed wherefore he made a representation to the Director General of Industrial Relations ('DGIR') under s. 20 of the Industrial Relations Act 1967 ('the Act') seeking for re-instatement. Conciliation meetings were held at the DGIR's office, following which the parties recorded a settlement on 20 August 1998, to the effect that Ho would be reinstated to his former post and would be paid backwages. The company paid Ho his backwages but, instead of reinstating him, offered him a post at the company's branch office in Klang. Ho complained to the DGIR who referred the dispute to the Minister. The Minister took the view that the there had been no settlement between the parties and that questions of law and fact had also been raised at the conciliation meetings. The Minister consequently invoked s. 24(3) of the Act and referred the dispute to the Industrial Court. Dissatisfied, the applicant applied for *certiorari* to quash the decision, arguing that the Minister had committed errors of law and had acted in excess of jurisdiction.

Held:

[1] The company had not demonstrated anything which showed that the Minister had exercised his discretion unlawfully when referring the representation to the Industrial Court. (p 680 d-e)

[2] The evidence clearly showed that there was no reinstatement of Ho on the agreed date. The letter from the company to Ho dated 2 September 1998, explaining that it would be disruptive of the company's operations for the company to have reinstated Ho, put it beyond doubt that there was no reinstatement. (p 681 h)

[3] Section 20(2) of the Act does not impose any duty on the DGIR to decide questions of law or ascertain the law and the facts. He is merely to deal with the situation as best as he could to enable the parties to settle the dispute. Consequently, any conciliatory meeting held by the DGIR is not a forum to discuss the rights and the law and the DGIR or his representative only sits therein as mediator, not as adjudicator. The DGIR is also not required to notify the Minister when there is a settlement but only when there is no settlement. And in so notifying the Minister, he is not required to do so by way of a report. He is merely to notify the Minister that there has been no likelihood of a settlement. (pp 681 h-i & 682 a-d)

[4] Since the company had not reinstated Ho as agreed, Ho's representation to the DGIR had not been resolved. In the event the DGIR was right in referring the matter to the Minister without having called for further conciliation proceedings. In view of the documents and letters before him, which showed that Ho's complaint was not frivolous or vexatious, it was not incumbent on the DGIR to call for further conciliation meetings. (p 681 e-f)

[Application dismissed.]

Case(s) referred to:

Minister of Labour and Manpower & Anor v. Wix Corporation South East Asia Sdn Bhd [1980] 2 MLJ 248 ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 20(1), (2), 24(3)

For the applicant - A Ramadass (M Shamini with him); M/s Ramadass & Assoc
For the 1st respondent - Amarjeet Singh SFC
For the 2nd respondent - Pravin Kaur; M/s Jessy & Assoc

Reported by WA Sharif

JUDGMENT

KC Vohrah J:

The applicant, SGS (Malaysia) Sdn Bhd ("the company") was dissatisfied with the decision of the 1st respondent ("the Minister") who referred a dispute

between it and the 2nd respondent, Ho Siang Lim (Ho), to the Industrial Court for resolution under s. 24(3) of the Industrial Relations Act 1967 ("the Act").

The company sought to quash the decision of the Minister on the grounds that:

(a) the Minister in making his decision to refer Ho's dismissal to be heard by the Industrial Court on 1 July 1999 committed an error of law by acting in excess of his jurisdiction when he failed to take into account the relevant consideration that both Ho and the company had reached a settlement at the Industrial Relations Department whereby Ho was duly reinstated to the company and was paid his backwages by the company;

(b) the Minister in making his decision to refer Ho's dismissal to the Industrial Court committed an error of law by acting in excess of his jurisdiction when he failed to take into consideration that the rules of natural justice were not observed when only Ho's subsequent complaint following the said settlement was heard whereas the company was not given the opportunity to be heard or to give its explanation in response to Ho's said complaint, before the decision was made on 1 July 1999 to refer Ho's dismissal to the Industrial Court;

(c) the Minister in making the decision on 1 July 1999 to refer to Ho's dismissal to the Industrial Court committed an error of law for having acted in excess of his jurisdiction when he failed to take into account the relevant consideration that Ho having been duly reinstated and paid his backwages as a consequence of the said settlement at the Industrial Relations Department made Ho's representations under s. 20(1) of the Industrial Relations Act 1967 frivolous and vexatious.

I dismissed the application for review.

Ho was the Operations Executive at the applicant's Prai office. In 1998 he represented to the Director-General of Industrial Relations (DGIR) under s. 20 of the Act that he had been constructively dismissed. He sought re-instatement under s. 20(1) of the Industrial Relations Act 1967.

Conciliation meetings were held by the Industrial Relations Department under s. 20(2) of the Act. On 20 August 1998 an agreement was reached (see exh. "MJ19.1" annexed to the affidavit of Mashan bin Jalil in support of the motion). The parties agreed to the following (translated from Bahasa Malaysia):

(i) The employer agrees to re-instate the Appellant to his former post on 24.8.98 (Monday) and for him to report for duty at the Prai Office as

usual. The Appellant will be paid backwages from the non-working period 18.5.98 until 23.8.98. Payment will be deducted from whatever pay that has been paid to the Appellant and will be paid not later than 3.9.98.

(ii) If he fails to report, as stated above, the Appellant will have no right to the backwages as stated above and also all interests and in such a case, the Appellant will be deemed no longer to be interested to work with the company and this case will be deemed closed.

(iii) This representation will be deemed settled unless and until all the above agreed terms have been complied with.

About 1 1/2 months after this agreement Ho wrote a letter to the representative of the DGIR informing him that the company had failed to re-instate him to his former position in the Prai Office.

Attached to this letter were all the letters exchanged between him and the company relating to the re-instatement issue and those same letters were considered by the Minister. From the letters it can be seen that the backwages have been paid. What was in dispute was whether there had been re-instatement. It is necessary to refer to three of these letters marked "MJ19.2", "MJ20" and "MJ21".

The letter marked "MJ19.2" reads as follows:

Mr. Ho Siang Lim
Present

24th August 1998

Dear Mr. Ho,

Subject: **Paid Annual Leave**

As per your request, the company needs sometimes to arrange your reinstatement. The company hereby grant you paid annual leave from 25/8/98 until 2/9/98 and kindly report to the office on 3/9/98 at 0900 hours.

Yours sincerely,

xxx
Mashan Hj Jalil
Human Resource Manager

It has to be noted that in the letter the opening words "As per your request," were deleted and against the deletion is what appears to be the initial of the person who signed for the Human Resource Manager.

The letter marked "MJ20" reads as follows:

2 Sept 1998

Mr. Ho Siang Lim
Present
SGS Prai

Dear Mr. Ho,

RE: TRANSFER

We thank you that you have been present at the Prai office on 24 August 1998.

Consistent with the memorandum which was raised and acknowledged by both parties at the Industrial Relation Office, you have no doubt that the company has reinstated you into our former position. You will also realize by now that the company has taken every step possible in order to reinstate you into the organization.

When you persisted of leaving the company on 18 May 98, despite company's repeated request for your return, you have actually left operations of the Department in a limbo. During your absence for 1 1/2 months, we were left with no choice but to implement new management organization, and place the current incumbent as Head of the Mineral & Industrial Department, effective 1 July 1998. *Reinstating you into your former capacity would mean removing the incumbent from the Department head's responsibility. By doing so, it is disruptive and unfair to the current incumbent as the management feel that he has done excellent job.*

Having considered all the circumstances, the company decides it is in the best interest of both parties that we secure you similar position with similar (if not bigger) responsibility elsewhere. For your information, since the Head of Mineral Department left Klang Branch, the Branch Manager has been holding this responsibility until now. It is most opportune time now that we offer this position to you. Understandably, Klang Branch is of much bigger operations and the responsibility of heading this Department is bigger and is certainly more challenging than that of Prai's.

Accordingly, the management has decided to transfer you to Klang Branch effective 14 September 1998. In order to prepare your movement, the company agreed to grant you paid leave until 9 September when you will report for duty to the Branch Manager. Thereafter you will continue with your leave in order to look for suitable accommodation at Klang. The company will pay reasonable related expenses arising from your transfer, namely the one time moving expenses and the temporary lodging from 9 to 14 September. Your salary is also raised to RM2,750.00 represent an increase of 11.34% per month, which will compensate some of the additional costs at Klang effective 14 September 1998.

> The management takes this opportunity to thank you for your past contribution and look forward to your continued support at the Klang Branch. We also wish you every success with your transfer.
>
> Yours faithfully,
>
> xxx
> Mashan Hj Jalil
> Human Resources Manager
> (emphasis added)

The Minister, according to his affidavit, had considered that the matters raised at the conciliation meetings by Ho and the company in the DGIR's office were questions of law and fact which merited reference to the Industrial Court for determination.

With regard to grounds (a) and (c) – that the Minister had failed to take into account that the parties had reached a settlement whereby Ho had been duly re-instated and had been paid his backwages (under the agreement reached between the parties at the reconciliation meetings in the DGIR's office) and therefore Ho's representation was frivolous and vexatious – it must be pointed out that the Minister in his affidavit has stated that he had considered that there was an agreement (the agreement) reached by the parties on 20 August 1998 and that although Ho had reported for duty as agreed and was paid his backwages he had not been re-instated to his former position. The Minister found that there was no settlement as para (iii) of the agreement had not been complied with.

There is need to highlight certain relevant matters. The letter "MJ19.2" dated 22 August 1998 by the company to Ho states, *inter alia*:

> the company needs sometime to arrange your reinstatement.

Paragraph 1 of the agreement (marked "MJ19.1") between them had this term:

> The Employer aggress to reinstate the Appellant to his former post on 24.8.1998 (Monday) and ...

It is apparent that there was no re-instatement on the agreed date, 24 August 1998.

The letter from the company to Ho dated 2 September 1998, marked "MJ20", puts it beyond doubt that there was no re-instatement. It explains, *inter alia*, why there could not be re-instatement:

> Reinstating you into your former capacity would mean removing the incumbent from the Department Head's responsibility. By so doing, it is disruptive and unfair to the current incumbent as the management feel that he has done excellent job.

Grounds (a) and (c) of the company for review cannot therefore stand.

I next deal with ground (b) where the company seeks to set aside the decision of the Minister on the basis that the Minister did not give the company an opportunity to be heard before he acted on the complaint of Ho that the matter had not been settled and had referred Ho's dismissal to the Industrial Court. The said complaint was addressed to the DGIR's office in Penang and in effect what the company is saying in that the DGIR's representative in Penang should have written to the company for its views before notifying the Minister that there was no likelihood of the representation being settled; that in effect there having been no opportunity of being heard on the said complaint in the DGIR's Department, the Minister was not properly seised of the matter and could not have reached the decision that he did to refer the representation to the Industrial Court.

The roles of the DGIR and of the Minister under s. 20(2) of the Act have to be examined. The provision reads:

> 20(1) ...
>
> (1A) ...
>
> (2) Upon receipt of the representation the Director-General shall take such steps as he may consider necessary or expedient so that an expeditious settled thereof is arrived at; where the Director-General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly.
>
> (3) Upon receiving the notification of the Director-General under subsection (2), the Minister may, if he thinks fit, refer the representation to the Court for an award.

The role of the DGIR under s. 20(2) has been explained by the Federal Court in *Minister of Labour and Manpower & Anor v. Wix Corporation South East Asia Sdn Bhd* [1980] 2 MLJ 248. It has to be noted that s. 20(2) as dealt with by the court contained a limitation for the settlement to be arrived at within thirty days from the date of receipt of the representation which was removed by Act A484. The court said at 250:

> Section 20(2) of the Act plainly does not impose any duty on the Director-General or his representative to decide or determine questions of any kind and to ascertain the law and the facts. He is merely required to deal with the situation in the way he thinks best to get the employer and employee to settle the dispute. If he is satisfied that there is no likelihood of settlement within a month, he is to notify the Minister. Any meeting convened is merely intended to be for the purpose of bargaining between the employer and the employee so that one can see the other's viewpoint and settle the dispute themselves. It

> is not a forum for discussing rights and the law. The Director-General or his representative sits in the meeting not as an adjudicator but as a mediator or, to use the word envisaged by the provision relevant in the Act, conciliator.

The court continued, on the role of the DGIR or his representative:

> ... Whether or not a settlement is reached is a situation brought about by the parties and not by his assessment of facts. The result is not his decision or determination of questions of any kind. The very fact that the Director-General is not required to notify the Minister when there is a settlement but only when there is no settlement, indicates that the result is determined by the parties and not by him. In notifying the Minister, section 20(2) of the Act does not appear to require him to do so in the form of a report on the circumstances leading to there being no settlement. He is merely to notify the Minister that there has been no likelihood of settlement.

Further the court held that the Director-General or his representative under s. 20(2) of the Act "cannot be said to exercise any powers which are analytically judicial" (see 250) and the steps which the Director-General takes which leads him to making a notification to the Minister "do not involve the exercise of judicial functions which require the application of the rules of natural justice." (see 251).

In the instant case the company had not re-instated Ho as had been agreed by the parties under para (i) of the agreement and therefore under para (iii) the representation of Ho which was made to the DGIR had not been resolved and rightly so the DGIR's representative referred the matter to the Minister without having called for further conciliation proceedings. I agree with the submission of Senior Federal Counsel that it was not incumbent for the DGIR or his representative to call for further conciliation meetings in the light of the contents of the letters which were before him which also showed that the complaint made by Ho was not frivolous and vexatious.

I also agree with the submission on the issue whether there had been re-instatement in accordance with the terms of the agreement that both parties were on an equal footing on this issue as only the said correspondence between the parties had been considered and there was really nothing that could be added to the correspondence. There was no disadvantage to either side.

The company has not demonstrated to the court anything which shows that the Minister had exercised his discretion unlawfully to refer the representation to the Industrial Court. I dismissed the company's application with costs.